SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,
vs.
SCOTT WOOD et al., Individually and as Members of and Composing the ARKANSAS PUBLIC SERVICE COMMISSION,
Respondents.

PETITION FOR REHEARING

Filed on Behalf of Petitioner.

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On the 8th day of December, 1952, the Court handed down its opinion in the above cause, at which time Mr. Justice Douglas, with whom the Chief Justice, Mr. Justice Burton, and Mr. Justice Minton joined, dissented. By order entered herein on the 16th day of December, 1952, the time for filing petition to rehear was extended to and including January 7, 1953.

Petitioner, Lloyd A. Fry Roofing Company, is much aggrieved at the action of the Court in affirming the judgment of the Supreme Court of Arkansas, and respectfully

petitions this Court to rehear, upon the following grounds, to-wit:

1. The opinion of the Court is not predicated upon determination of any basic issue presented by the pleadings or determined by the Court below.

2. The opinion of the Court ignores entirely the position assumed below by respondents in pleading and by respondents' officials testifying under oath as to the past and proposed application of the Arkansas Motor Carrier Act (Act 367, Arkansas Laws, 1941) in respect to the transportation of petitioner's goods in interstate commerce, and substitutes for the statutory language, the pleadings, the proof, and the position heretofore assumed in brief by respondents, a position with respect to discretionary powers of the Commission first assumed in a late-filed brief herein.

3. The state Commission cannot lawfully disclaim intention to comply with the positive mandates of the Act by which it was created.

4. The opinion erroneously elides the mandatory word "shall" from the state statute in question, and the holding of the Court is predicated upon an unjustified substitution of a discretionary "may" therefor.

5. The opinion of the Court erroneously fails to take cognizance of the fact that in stark reality petitioner's drivers are being arrested and criminally prosecuted, not for failing "to identify themselves as users of that state's highways," to quote the opinion herein, but for failing to hold "a permit or certificate of convenience and necessity from the Arkansas Public Service Commission" (**P. S. C. v. Fry**, 219 Ark. 553, 554).

6. The Court erred in treating the issue involved as being the right of the Arkansas Commission to regu-

late use of Arkansas highways, as distinguished from the right to regulate the business of engaging in interstate commerce.

7. The Court erred in impliedly adopting the position said to be assumed by respondents (and that for the first time in brief filed in this Court) that the sole objective of respondents is to require interstate carriers to identify themselves ". . . in order that it [the Commission] may properly apply the state's valid police, welfare, and safety regulations to motor carriers using its highways," and in considering that in any respect any issue is presented relative to the exercise by any state agency of any police power, welfare or safety regulation.

8. The Court erred in basing its holding on the conclusion that the operation in question is a "sham" when no consideration, apparently, has been given to the undisputed evidence of bona fide compliance, in actual operation, with all applicable criteria established by federal statutory or administrative pronouncements.

9. The Court erred in not holding that the State here is seeking, unlawfully, to regulate interstate commerce in a field preempted by Congress.

BRIEF AND ARGUMENT.

The questions presented by this petition for rehearing are, in many respects, essentially different from those heretofore urged, albeit the fundamental position heretofore assumed by petitioner remains unchanged. By the opinion herein issues have been injected and apparently considered as controlling which heretofore, insofar as petitioner was advised, had no place in the litigation.

In the light of a careful analysis of the opinion herein, the statute of the State of Arkansas involved, the opinion of the court below and principles previously enunciated by this Court we strongly feel that except for the concluding sentence of the opinion herein, such opinion would not have become the opinion of this Court. Such sentence is:

> "At present **we hold only** that Arkansas is not powerless to require interstate motor carriers **to identify themselves as users of that state's highways.**" (Emphasis added.)

This very carefully worded holding of the Court is obviously predicated upon the two erroneous conclusions that (1) all that the Arkansas Commission is seeking to do, under authority of the statute involved, is to require motor carriers to "identify themselves", and (2) that the question presented is the right of the Commission to regulate use of Arkansas Highways, rather than the authority of the Arkansas Commission to require the **holding** of a permit or certificate of convenience and necessity as a prerequisite to **engaging in the business** of interstate transportation, and as distinguished from the simple making of application therefor. The opinion, in other words, and as will be discussed more fully hereafter, treats only of the question of regulation of use of state highways, rather

than regulation of the business of interstate motor carrier transportation, the true issue in the case.[1]

It appears, as well, that the Court could not have more plainly stated that its holding was not to be construed as being determinative of any other question presented by the "Specification of Errors to be Urged" appearing at pages 16-17 of petitioner's brief herein. And, apparently, the holding herein is not intended to be considered as going so far as to approve the conclusion of the court below that the truck drivers are "contract carriers" within the meaning of the Arkansas Act.

Before further examining the holding herein in the light of the involved statute and the record in the case we pray leave of Court to point out that such holding appears to be predicated solely and alone upon findings in the opinion upon factual questions here **for the first time** presented in

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1 It is significant that in **Buck v. Kuykendall**, 267 U. S. 307, where a state statute similar to one here involved was under consideration, the line between what constitutes regulation by a state of the use of its highways and regulation by a state of interstate commerce was clearly drawn. In this connection Mr. Justice Brandeis, at pages 315-6, said:

> "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce . . . Thus the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it. Such state action is forbidden by the Commerce Clause."

And, in this same connection in **Bush Company v. Maloy**, 267 U. S. 317, at page 324, Mr. Justice Brandeis said:

> "The state action in the **Buck Case** was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation."

The decisions in the Buck and Bush cases were handed down before enactment of Part II of the Interstate Commerce Act, whereby the field of interstate motor carrier transportation was pre-empted by Congress.

the ligitation, which findings are contra to the technical record in the case, as well as to the undisputed testimony of respondents' officials and the findings of the court below.

For example, in order to distinguish this case from the holding of the Court in **Buck v. Kuykendall**, 267 U. S. 307, the opinion herein, at page 4, states:

> "It [the Arkansas Commission] **has asked these driver-owners to do nothing except apply for** a permit as contract carriers are required to do by the state Act."

Presumably this finding is that upon which the Court relies in saying, "At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways."

The foregoing basic finding, we repeat, is contrary to the technical record as well as the testimony of officials of the Arkansas Commission. The uncontradicted record is that petitioner's drivers have been arrested and are being criminally prosecuted, and will be arrested and criminally prosecuted, with resultant interference with interstate commerce, for failure to **hold** a permit or certificate of convenience and necessity from the Arkansas Commission under the Arkansas statute, with no word or syllable of record supporting the foregoing finding that these drivers have been asked "to do nothing except apply for a permit", or that they are being criminally prosecuted for failure to make such application.

For example, the Supreme Court of Arkansas, **P. S. C. v. Fry**, 219 Ark. 553, 554, said:

> "Thereupon said officers arrested the driver for violation of the aforementioned Act **in that neither he nor Whitington held a permit or certificate of con-**

venience and necessity from the Arkansas Public Service Commission." (Emphasis supplied.)

Further, the answer of the Commission filed in the trial court (R. 21) clearly shows the position of the Commission to be that the drivers are being prosecuted for failure to **have** as distinguished from failure to apply for, a permit or certificate; in addition, the Commission's enforcement officer testified that the drivers were arrested and criminally charged "for operating without a certificate or permit" as distinguished from "applying" for a permit or certificate or "identifying" themselves (R. pp. 129, 132, 133, 138). The position of the Commission that, under the Arkansas statute, it is authorized to arrest the drivers and interfere with interstate commerce until a certificate or permit has been **issued** by the Commission is clearly demonstrated by the testimony of the Commission's enforcement officer appearing at page 138 of the record:

"Q. Had you not been restrained by this Court, you would have continued to arrest these drivers every time you stopped them?

A. Where I found a violation of the law it was my duty to arrest them.

Q. If the driver told you he owned the equipment which he had leased to Whitington and that he was employed by Fry Roofing Company, then you would have arrested him?

A. Well, I suppose so.

Q. And you will resume those arrests if this injunction or restraining order is not made permanent?

A. My job is to keep them from operating illegally on the highways **until they get a permit to operate.**" (Emphasis supplied.)

And now, in this same connection, we direct the attention of the Court to that additional portion of the opinion

herein upon which the holding is based, appearing at page 4 thereof, as follows:

> "And the State Commission here expressly disclaims any 'discretionary right to refuse to grant a permit for contract carriage where that carriage is interstate commerce.' The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency."

Here the opinion does two things, both in violence to a proper disposition of the issues in this cause upon the record as certified to this Court. First, it bases the holding herein upon a purported representation as to disclaimer by the Commission of any "discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce."

Such alleged disclaimer, being the foregoing quotation appearing in the opinion, is lifted bodily from the brief filed belatedly on behalf of respondents, with which we were not served prior to argument of the cause before this Court. When we did have opportunity to read the brief in which this "disclaimer" was contained our reaction was that same was so obviously mere "lawyer talk," and so thoroughly at variance with the position assumed of record below by the Commission, the holding of the Arkansas Supreme Court, and the authority vested in the Commission by the Arkansas Motor Carrier Act, that it would be readily recognized for what it was and so dealt with by this Court, and that to dignify same by pointing out the apparently obvious was not indicated. That in this assumption we were wrong is no more clearly demonstrated than by the fact that the holding of the Court herein is predicated upon this position assumed by respondents in brief. The late-filed brief, rather than the certified record which it contradicts, is erroneously made the basis for the opinion herein.

Considered in this same connection should be the finding on page 4 of the opinion herein that "The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency."

It is interesting to note that this new position was not assumed by respondents in the pleadings below, in brief before the Supreme Court of Arkansas, nor in the brief of respondents in opposition to the petition for writ of certiorari filed herein, wherein "obtaining" a certificate or permit was treated as the prerequisite for avoiding criminal prosecution, with no intimation to the effect that the state simply wanted the drivers to "register" or "identify" themselves."

The purpose of this switch in positions is obvious—to avoid the impact of the opinion of this Court in **Buck v. Kuykendall**, 267 U. S. 307, as well as of Article I, Section VIII, Clause III, of the Constitution of the United States, Part II of the Interstate Commerce Act, 49 Stat. L. 543, as amended, U. S. Code, Title 49, Chapter 8, Sec. 301 et seq., and to ignore the limitations placed upon the authority of the Arkansas Commission by the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas 1941.[2]

In the first place, the Arkansas Public Service Commission is a state agency created by statute and vested only with the authority prescribed by statute. We say with all the emphasis at our command that nowhere in the Arkansas statute is the Commission vested with express or implied authority to require the drivers to "register with the appropriate agency" or "identify themselves as users of that state's highways," or to criminally prosecute a driver or

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2 It is not believed that this belated disclaimer is sufficient to bring into play the ruling in **Clark v. Poor**, 274 U. S. 554, where the Commission recognized, before the suit was begun, that, under the statute there in question, it had no discretion but to grant a permit where the carrier was engaged exclusively in interstate commerce.

carrier for failure so to do. And neither, by the same token, can the Commission lawfully waive or disclaim intention to comply with the positive mandates of the statute.

We believe that, in large measure, the opinion herein results from the unfortunate substitution, at page 4 thereof, of the word "may" for the word "shall" in referring to the provisions of Section 11 of the Arkansas Motor Carrier Act. We respectfully present that when the Act is properly read the opinion herein in and of itself necessitates a different conclusion. At page 4 of the opinion herein this Court said:

> "Section 11 of that Act [Arkansas Motor Carrier Act] requires contract carriers to get a permit and outlines certain considerations the state commission **may** weigh in granting or refusing the permit. Among these matters is the adequacy of transportation services already being performed by 'any railroad, street railway or motor carrier.' **Refusal of a state certificate based on such grounds was held to be an unconstitutional obstruction of interstate commerce in Buck v. Kuykendall**, 267 U. S. 307. **To deny these interstate carriers an Arkansas permit for such reasons would conflict with the Buck holding.**" (Emphasis supplied.)

We are to assume, of course, that this Court does not propose to hold that the Arkansas Commission in dealing with interstate commerce may ignore the plain statutory language in fulfilling the obligations upon it resting, or that the Commission may exercise powers not delegated to it by the Arkansas Legislature.

In contradistinction to the use of the word "may" in the opinion herein, Sections 11 (d) et seq. of the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas 1941, dealing with permits of contract carriers by motor vehicle, provide:

"No permit shall be issued by the Commission **except** upon a hearing at least twenty (20) days after service of notice to interested parties of the time and place thereof. (e) In granting applications for permits the Commission **shall** take into consideration the reliability and financial condition of the applicant and his sense of responsibility toward the public; the transportation service being maintained by any railroad, street railway or motor carrier; the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, and the effect which such proposed transportation service may have upon existing transportation service and any other matters tending to show the necessity or want of necessity for granting said application. (f) The Commission **shall specify** in the permit the business of the contract carrier covered thereby and the scope thereof and **shall** attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier the requirements established by the Commission under this Act; . . . (h) No permit shall be issued for a total mileage in excess of twenty percent (20%) of the total mileage within the State Highway System."

The assumption would not be too violent, we take it, that the Arkansas Commission will so enforce the Act as to effectuate the ends set forth in Section 2 thereof; similarly, that it will issue no permit for contract carriage except after a hearing at which the Commission will follow the positive mandates of the statute and inquire into the fitness, willingness and ability of applicant, whether or not the proposed operation is in the public interest, the reliability and financial condition of the applicant, the transportation serv-

ice being maintained by any railroad, street railway or motor carrier, the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, the effect which such proposed transportation service may have upon existing transportation services, and any other matters tending to show the necessity or want of necessity for granting said application. It is to be presumed, as well, that in effectuation of the purposes of said Act the Commission will grant or deny the permit upon the basis of its findings in the particulars above. Such perforce requires the exercise of discretion by the Commission.

Unless, therefore, it is the position of the Commission that it is not bound by the statute which it seeks to enforce, that it does not propose to observe the unequivocal mandates of the statute, and that it proposes simply, dehors the statute, to require operators of motor vehicle equipment in interstate commerce to "register" or "identify themselves," then, in that event, the position assumed in brief of disclaiming any "discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce" is ill-taken, and the opinion and holding of the Court herein predicated thereon, combined with the substitution of "may" for "shall" in construction and application of the statute in question is, we respectfully submit, essentially erroneous.

Unless, therefore, it is to be assumed that the Arkansas Commission will disregard, entirely, the statute by which it is created and under which it operates, then the reasoning of the opinion herein relative to prematurity of the position that interstate commerce is being unduly burdened is without application.

True it is that " . . . . the Arkansas Act imposes upon its Commission the duty of reconciling state regulation with that of the Interstate Commerce Commission . . . ,"

but no attempt so to do has been made by the Arkansas Commission; the Arkansas Act expressly precludes application thereof to private carriage, but neither below nor by the opinion herein has the status of petitioner as a private carrier been determined; while the transportation involved admittedly is interstate transportation, no step has been taken by the Arkansas Commission to determine the position of the Interstate Commerce Commission with respect thereto; and while the Commission under Sections (6) and (7) of the Act is empowered to administratively determine questions arising under the Act, either by itself or by joint hearings with authorities of the United States, or by the seeking of civil injunctive relief in the courts, no such attempt to seek a solution to the problem involved without interfering with and unduly burdening interstate commerce has been made, but the Commission has chosen, irrespective of consequences, to proceed by the criminal route.

Thus it is, while at one and the same time this Court says, "At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways," it also says that the judgment of the court below is affirmed, and the judgment of the court below sanctions criminal prosecution of the drivers, not for failing to properly "identify themselves" or to "register," but **for failure to hold a permit of convenience and necessity issued by the Commission.** The arrests continue; the criminal prosecutions go on, and interstate commerce has been, is being and will be unduly burdened and destroyed.

We cannot refrain from observing the significance of the further statement at pages 4-5 of the opinion, whereby another new consideration enters the picture:

> "Such an identification is necessary, the Commission urges, in order that it may properly apply the state's

valid police, welfare, and safety regulations to motor carriers using its highways."

We do not understand such to be the position of the Commission in this case, and respectfully submit that if it were it could not be urged in good faith. The Court apparently alludes to the statement made in the last sentence on page 8 of respondents' belatedly-filed brief. Such statement, as we read it, is not subject to the interpretation placed thereon by the opinion herein.

In the first place, there is no issue raised in the record with respect to exercise of the state's police power, welfare, or safety regulations: as a matter of fact, by stipulation in the trial court, the temporary restraining order procured by petitioner was dissolved in order that no such question would be involved in the litigation and that the issue would be limited safety to the right of respondents under the state statute, to require the obtaining of contract carrier permits before the interstate commerce involved might be performed (R. pp. 19-20); and, in this same connection, it should be observed that the state statute involved invests the Arkansas Commission with **no police power or welfare authority**, and that the only safety regulations which it may promulgate or enforce are those which have been "or which may from time to time be prescribed by the Interstate Commission for contract carriers by motor vehicles engaged in interstate or foreign commerce." [Section 6 (a) (2), Act 367, Acts of Arkansas, 1941.]

The holding herein, while concluding that the judgment of the court below is affirmed, in reality does not constitute an affirmation thereof.

The Supreme Court of Arkansas held simply that, within the meaning of the Arkansas Motor Carrier Act, the truck-drivers involved were "contract carriers," and that they

were subject to arrest and criminal prosecution for failure to have certificates of necessity and convenience issued by the Arkansas Public Service Commission. To quote, the court said (219 Ark. 553, 557):

> "In the light of the above we are of the opinion that the driver-owners involved in this litigation were **contract carriers** as defined in the section of Act 367 of 1941 quoted above and that they were therefore required to have a Certificate of Necessity and Convenience from the Arkansas Public Service Commission."

Section 11 (a) of the Arkansas Motor Carrier Act, Act 367, Acts of Arkansas, 1941, provides:

> "No person shall **engage in the business** of a contract carrier by motor vehicles over any public highway in this state unless there is **in force** with respect to such carrier a permit issued by the commission, authorizing such persons **to engage in such business.**" (Emphasis supplied.)

The penal provisions of said Act are contained in Section 22 thereof, and the decision of the court below sanctions arrest and criminal prosecution of the drivers for failure to meet the requirements of Section 11 (a) thereof. In other words, it sanctions regulation of interstate motor carrier transportation by the Arkansas Public Service Commission, and prohibits any person from **engaging in the business** of a contract carrier by motor vehicles over any public highway in the State of Arkansas unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business.

The opinion of the Court herein, we respectfully present, overlooks entirely the basic holding of the court below,

and while purporting to affirm same predicates its ultimate holding on the "use of the highways," principle, finding that a state may require a driver to "register," or "identify" himself as **a user of a state highway**. The case at bar contains no issue with respect to the right of a state to regulate use of its highways, in a field not pre-empted by Congress. The opinion, therefore, is not determinative of the material issue in the case at bar as to the power of the state commission to regulate engaging in the business of interstate transportation.

Conceding, as all parties to the litigation must, that the only transportation here involved is interstate transportation, the paramount issue inevitably is the extent to which a state commission may regulate and determine the right of a person to "engage in the business of a contract carrier by motor vehicles" in interstate commerce, a field pre-empted by Congress as heretofore set forth by us in brief and summarized at page 4 of the dissenting opinion herein.

Until this issue is determined, the judgment of the court below cannot be said to be affirmed.

While we agree with the dissenting opinion that Congress has pre-empted the field of interstate transportation here involved, precluding both inconsistent and overlapping state regulations, and that such should be determinative of this litigation, inasmuch as the opinion of the Court does not agree with this view, it appears then that determination of a number of the additional issues heretofore raised herein is necessary to proper disposition of the litigation.

And, at this point and for the following reasons, we concede that we find ourselves somewhat between the "rock and the hard place"; as well, the state of confusion in the motor carrier industry and in the various regulatory bodies

dealing therewith engendered by the opinion herein is one of substantial proportions.

This Court says **only** that our drivers shall "identify themselves," while, at the same time, the court below says that the drivers are subject to criminal prosecution for not having permits of convenience and necessity issued by the Arkansas Commission. Assuming, arguendo, that the truck drivers, engaged solely in interstate commerce, must apply for contract carrier permits, to whom should such application be made, the Arkansas Commission under the Arkansas statute or the Interstate Commerce Commission under the Federal Motor Carrier Act? Then, at that point it must be determined whether the transportation in interstate commerce is contract or private carriage; the Arkansas Act by its terms is precluded from application to private carriage, while the Federal Act defines both contract and private carriage, and the Interstate Commerce Commission has very carefully delineated the criteria to be applied in determining whether contract carriage is being performed. Shall, then, the conclusion of the court below that the definition of "contract carrier" in the Arkansas Act was intended to be "all inclusive" be applied or shall the definitions of the Federal Act and of the Interstate Commerce Commission relative to interstate motor carrier transportation be applied? Presumably, inasmuch as interstate transportation alone is involved, the provisions of Part II of the Interstate Commerce Act and the rules, regulations and decisions of the Interstate Commerce Commission thereunder must be applied in determining whether the transportation being performed is contract or private carriage.

Such being the case, consideration of the criteria established by the Interstate Commerce Act and Interstate Commerce Commission becomes imperative. No consideration whatsoever has been given thereto either by the court be-

low or in the opinion herein. The court below simply concludes that the drivers are "contract carriers" within the meaning of the state definition—and the opinion herein does not deal with the question.

For example, inasmuch as the only transportation being performed is of petitioner's merchandise, it becomes essential to ascertain (1) whether petitioner is a bona fide private carrier within the meaning of the "primary business test" enunciated by this Court and the Interstate Commerce Commission; if it is, then the truck drivers at one and the same time cannot be contract carriers in the performance of the same transportation. (2) It is essential that it be determined, as well, whether a bona fide employer-employee relationship exists between petitioner and its truck drivers, for, perforce, if the drivers are bona fide employees they cannot at one and the same time be contract carriers in performance of the same transportation. (3) With respect to the utilization of leased equipment in interstate transportation, it is imperative that it be determined whether the "direction and control" test enunciated by the Interstate Commerce Commission and approved by this Court has been met, or whether simple ownership of equipment is to be determinative of whether contract or private carriage is being performed. In this connection the court below says (219 Ark. 553, 555):

> "Appellee says it has a right to lease transportation equipment and hire its own drivers and thereby become a private carrier just as it would concededly be if it owned said equipment outright, and as a general proposition we think this is true."

After such concession, which without question is correct, we strongly urge that the undisputed facts of record should have been considered and applied in determining whether petitioner is, in truth and in fact, a private carrier.

In other words, if it is not to be held that here the State is invading a field of commerce pre-empted by Congress, nevertheless, it being conceded that the transportation involved is solely interstate transportation, whether it is private or contract carriage must be determined by application of established Federal standards. Such has not been done.

And, finally, we respectfully present that before it can be determined whether an equipment lease arrangement is bona fide that actual operation thereunder must be examined and due consideration given thereto in determining whether contract or private carriage is being performed.

The record in this case is as clean as the proverbial "hound's tooth" on the proposition that a true employer-employee relationship existed between petitioner and its truck drivers; that petitioner exercised exclusive direction and control over the motor vehicle equipment and drivers thereof, irrespective of by whom the equipment was owned, and that the terms and provisions of the written equipment leases were scrupulously complied with in every respect.

It is significant that the courts in **United States v. LaTuff Transfer Service**, 95 F. Supp. 375, and cases therein cited, recognized that both the direction and control test and compliance with the provisions of equipment leases in actual operation were of paramount importance in determining the bona fides of the transportation being performed. We cannot but again direct the attention of the Court to the fact that upon the basis of the **LaTuff Case**, supra, and cases there cited, the Arkansas Public Service Commission promulgated its Conference Rule and Order in Case R-461 (R. 199-200) setting forth the criteria to be applied in determing whether private or contract carriage was being performed, and that the uncontroverted evidence is that every element of private carriage is present in the case at

bar (R. pp. 87 et seq., 38 et seq.), measured by the most rigid standards prescribed in any decision.

It is of more than passing significance that neither the court below nor this Court in its opinion has made any finding on the foregoing basic, uncontradicted, and undenied questions of fact. On presentation of the case, we endeavored, ineffectually it must be admitted, to point out the fundamental difference between basic findings and mere conclusions. The opinion herein, after stating that this Court is being urged "to set aside the findings of the State Supreme Court before passing upon the constitutional questions presented" goes on to state that the findings of the Arkansas Supreme Court "are not without actual foundation, and we accept them."

We cannot refrain, after a further careful reading of the opinion of the court below, from taking issue with the opinion herein as to what the findings of the court below actually were. The opinion herein, page 3, says:

> "Reviewing the facts for itself, the State Supreme Court found that the arrested truck drivers were not petitioner's employees, that the truck lease arrangements were shams, and petitioner was therefore a shipper—not a carrier of any kind."

We respectfully submit that all the court below did was to conclude that the drivers were "contract carriers," with no reference to any factual basis for the conclusion. We respectfully take issue with the statement that the court below found the arrested truck drivers were not petitioner's employees—the opinion below, as we read it, makes no reference to the relationship between petitioner and the truck drivers. Further, we respectfully take issue with the finding that the court below found petitioner to have been "a shipper—not a carrier of any kind." No finding at all as to petitioner's status appears in the opinion below.

And, finally, we respectfully take issue with the statement that the court below found "that the truck lease arrangements were shams." What the court below did say in this connection was (219 Ark. 553, 557):

> "It seems to us that the arrangements made by appellee to deliver its own products as set forth above amount only to a clever plan to circumvent the letter and spirit of the law."

We respectfully present that if all of the plans formulated and utilized by modern business designed, within permissible limits, to circumvent or avoid the impact of legislation of various types were, for such reason alone, declared to be "shams" then, in that event, a major portion of the systems and methods of operation of modern business enterprises would forthwith be declared illegal.

Without laboring the point, take for example the numberless plans evolved and put into operation designed solely for the purpose of circumventing both state and federal tax laws. So long as effectuation thereof is not prohibited by law, the relationships between the parties are entered into in good faith, and the plans complied with in actual operation, the simple fact that thereby the impact of some piece of legislation is avoided is not sufficient to imbue the plan with illegality.

In the case at bar admittedly private carriage, over which the Arkansas Commission has no jurisdiction under the state Act, can be performed by petitioner by the use of leased equipment and the employment of its own drivers. Admittedly the written equipment leases set forth the terms thereof. Other than in the trial court below we have been unsuccessful in obtaining any finding with respect to any factual element material to and determinative of the question whether private or contract carriage was being performed.

The court below having concluded that the definition of "contract carrier" in the Arkansas Act was "all inclusive" and that, perforce, the truck drivers were "contract carriers" went on frankly to say that:

> "Much of the testimony introduced at the hearing below need not be recounted or considered, under our view of the matter . . . ." (219 Ark. 553, 555).

This court in adopting what it terms the findings of the court below presumably also has not taken into consideration "much of the testimony introduced at the hearing below."

We seek here to have this Court do only what the learned Justice speaking for the Court in this case has heretofore said the Court should do, and that which the Court has heretofore done, in determining legality of a transaction, i. e., to determine the legality of an arrangement by seeing "what was actually done" thereunder. In this connection Mr. Justice Black in **United States v. City and County of San Francisco**, 310 U. S. 16, 28, said:

> "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the city and the power company to see what was actually done we see, etc. . . ."

All we here ask is that this Court consider the evidence which has heretofore been neither recounted nor considered, see "what was actually done," and when such is done we are convinced that the Court will find, upon the record as made, that petitioner is a bona fide private carrier engaged solely in interstate commerce, that a true employer-employee relationship exists between petitioner and his truck drivers, that petitioner has had and exer-

Arkansas Public Service Commission

CHAS. C. WINE, CHAIRMAN

JOHN R. THOMPSON
COMMISSIONER

RICHARD McCULLOCH, JR.
COMMISSIONER

Little Rock, Arkansas

December 8, 1949

Messrs Wrape and Hernly, Attorney
Sterick Building
Memphis, Tennessee

Attention: Mr. James W. Wrape

Re: State of Arkansas vs. Boshers
pending Justice of the Peace
Court, Long's Court, Carlisle,
Arkansas

Dear Mr. Wrape:

Your letter of December 2, 1949, reached my desk during my absence and I am informed by the Enforcement Officers that the case was heard and disposed of yesterday, resulting in a fine of $90.00 and cost, a total of $100.00.

With regard to the photostatic copies of lease attached to your letter, a reading of the lease attached would indicate that there is perhaps not too much wrong with the lease itself, but I am also advised that an investigation by this Commission and the Interstate Commerce Commission indicates that the lease is not being complied with. In other words the actual operation is not consistent with the lease.

With best wishes for the Holiday Season, I am

Sincerely yours,

Chas. C. Wine

CCW:GW

CHAS. C. WINE, CHAIRMAN

APPENDIX "A"

cised exclusive direction and control over the operation of motor vehicle equipment and the drivers thereof, that the equipment lease agreements have been scrupulously complied with in actual operations thereunder, and that no element of contract carriage within the meaning of Part II of the Interstate Commerce Act or the rules, regulations and decisions promulgated and rendered thereunder by the Interstate Commerce Commission is present, and that, irrespective of all other considerations, the Arkansas Act has no application to such private carriage.

If merely to "register" or to "identify" the operators of equipment using the highways of Arkansas were authorized and would suffice to satisfy the State's requirements we would readily concede that such would not constitute an undue burden on interstate commerce, but such, as a practical matter, as pointed out aforesaid, furnishes no response to the criminal charges now being pressed by the Arkansas Commission, and neither will the mandates of the Arkansas Act be satisfied thereby.

Neither are we at variance with the principle that a state may lawfully require the holding of a permit for the use of its highways in performance of interstate commerce or contract transportation, where such permit must be granted as a matter of course and without discretion on the part of the Commission, and within limits permitted by federal authority. Before, however, even such non-discretionary permit may be required it must first be established that common or contract carriage, as defined by federal legislation and regulation of federal regulatory bodies, is being performed. Not only is there complete absence of such finding in the case at bar, but, as well, it is established that the Arkansas statute makes it mandatory that its commission weigh all of the features contained in Section 11 (a) of the Act and grant or deny applications upon the basis of its findings therein. Such

necessitates the exercise of discretion. Such constitutes unlawful regulation of interstate commerce.

For the reasons aforesaid, petitioner respectfully requests a rehearing in this cause.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
Attorneys for Petitioner.

Of Counsel:
WRAPE and HERNLY.

CERTIFICATE.

I, Glenn M. Elliott, of counsel for petitioner in the above styled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

Witness my hand and seal this the 3rd day of January, 1953.

Glenn M. Elliott,
Of Counsel for Petitioner.

Supplement to Petition For Rehearing Filed on Behalf of Petitioner

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 37.

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

v.

SCOTT WOOD et al., Individually and as Members of and Composing the Arkansas Public Service Commission,
Respondents.

SUPPLEMENT TO PETITION FOR REHEARING FILED ON BEHALF OF PETITIONER.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
2111 Sterick Building,
Memphis, Tennessee,
Counsel for Petitioner.

Of Counsel:
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SUPREME COURT OF THE UNITED STATES.

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Respondents.

SUPPLEMENT TO PETITION FOR REHEARING FILED ON BEHALF OF PETITIONER.

Comes petitioner, Lloyd A. Fry Roofing Company, and respectfully submits this supplement to its petition for rehearing filed in the above cause on January 3, 1953, as follows:

The supplement does not seek to enlarge the specification of errors heretofore presented, but seeks to supply the Court with pertinent information recently coming to the attention of counsel for petitioner.

J. B. Boshers was one of the drivers whose arrest by Arkansas officials precipitated this litigation (R. p. 113). The lease covering his equipment was the uniform form (Stip. R. p. 243; Ex. 26, R. p. 196, Ex. 1 to Dep. R. p. 27).

The opinion of the Supreme Court of Arkansas is predicated solely and alone upon findings and conclusions resulting from an analysis of the equipment lease forms, supra, executed by Whittington and the driver-owners, and the leasing agreement between Whittington and the Lloyd A. Fry Roofing Company (R. p. 7 et seq.), with no consideration whatsoever being given to evidence of record with respect to actual operations conducted thereunder. See **Public Service Commission v. Fry**, 219 Ark. 533 et seq.

Neither, if we correctly read the opinion herein, did this Court go any further in considering the factual situation reflected by the record than did the Arkansas Supreme Court, which admittedly did not consider "much of the testimony introduced at the hearing . . ." (**Public Service Commission v. Arkansas**, 219 Ark. 553, 555).

Heretofore in our petition for rehearing we have pointed out, with record references, to the inconsistency between the position assumed by the Arkansas Public Service Commission upon the trial of this cause and that now assumed by such Commission in brief as to its conception of its powers and the obligations of the affected drivers under and by virtue of the Arkansas Motor Carrier Act. This Court, as we pointed out, erroneously followed the "brief position" of the Arkansas Commission, first assumed in this Court, without taking cognizance of the contra posi-

tion assumed, under oath, by officials of the Arkansas Commission, and the stark reality of the pending criminal actions. Thus, in that respect, a grave and substantial inconsistency is demonstrated of record.

By this supplement to the petition for rehearing we wish to direct the attention of the Court to another inconsistency of equal gravity and magnitude. The opinion of the Arkansas Supreme Court, approved by this Court, is predicated upon the assumption that the Arkansas Public Service Commission **challenged the equipment leases involved.** Such, as a matter of fact, is not the case. We knew, upon trial of the cause, that the Arkansas Commission had approved the form of equipment leases, and challenged only actual operations thereunder. We had been so advised by members of the Commission, but no commissioner attended the trial or presented himself as a witness and we were not afforded opportunity to cross-examine a commissioner on this point.

We now learn, and so advise the Court, that after an examination of the lease in the **Boshers** case, supra, the chairman of the Arkansas Public Service Commission, following the arrest of Boshers, wrote on December 8, 1949:

> "With regard to the photostatic copies of lease attached to your letter, a reading of the lease attached would indicate that **there is perhaps not too much wrong with the lease itself,** but I am also advised that an investigation by this Commission and the Interstate Commerce Commission indicates that the lease is not being complied with. In other words the actual operation is not **consistent with the lease.**" (Emphasis supplied.)

In other words, the opinion of the Arkansas Supreme Court, affirmed herein, is not consistent with the position

assumed by the Arkansas Public Service Commission. We have vigorously urged that "actual operation" under the leases was established by the record to be consistent therewith, knowing, as we did, that it was not the form of the lease but "actual operation" thereunder that was challenged by the Commission. "Actual operation" has not, however, been referred to either by the Supreme Court of Arkansas or by this Court in the opinions filed.

Frankly, [illegible] members of the bar of this Court, we represent to the Court that on the date this supplement to petition for rehearing was dictated, i. e., February 27, 1953, we were first advised of the existence of the foregoing letter. Its existence was then discovered by accident. There is no excuse which we can offer except that of clerical inepitude. By mischance the letter was stapled on the back of an unrelated document and misfiled, without ever having been brought to the attention of counsel for petitioner. If thereby petitioner shall be damned then petitioner stands damned.

Knowing full well, however, that the concern of this Court is to see that justice be done, irrespective of technicality, we have persuaded ourselves that we should take the risk of such castigation as may be our lot by directing the attention of the Court to the above matter which, admittedly, is dehors the printed record. The original of the letter to which reference is made, having been signed by the Honorable Charles C. Wine, chairman of the Arkansas Public Service Commission, is reproduced as an appendix hereto. It would have been filed upon hearing of the cause had counsel known of its existence.

Our thinking is that this letter, without peradventure of a doubt, establishes the existence of a further inconsistency between the position of the Arkansas Public Service Commission and the position attributed to the Commis-

sion and discussed at such length by the Arkansas Supreme Court in its opinion, affirmed by this Court in its sharply divided opinion.

We sincerely believe that, by virtue of the matters presented in the petition for rehearing filed on January 3, such rehearing should be granted and the matter disposed of in this Court on the record as made. If, however, perchance we should be misguided in our thinking we firmly believe, as well, that the information contained in the appendix hereto is sufficient to justify, nay even demand, that the case be remanded to the Supreme Court of Arkansas with instructions that it consider the evidence of record and make findings of fact with respect to whether "actual operation" was consistent with the equipment lease agreements. Until the evidence of record is considered the issues in the case will not have been determind in the light of the law applicable thereto as it will finally be enunciated by this Court.

Insofar as we are advised no response to the petition for rehearing has been filed, and we assume, therefore, that no response hereto will be filed. We assure the Court, however, that we have no objection whatsoever to respondents being granted any additional time which they may wish for the preparation and filing of response hereto.

For the reasons heretofore presented, petitioner respectfully requests a rehearing in this cause.

JAMES W. WRAPE,
GLENN M. ELLIOTT,
2111 Sterick Building,
Memphis, Tennessee,
Attorneys for Petitioner.

Certificate.

I, Glenn M. Elliott, of counsel for petitioner in the above styled cause, do hereby certify that the foregoing supplement to petition for rehearing is presented in good faith and not for delay, and that the relief sought is restricted to the grounds specified therein.

Witness my hand and seal this the 27th day of February, 1953.

(s) Glenn M. Elliott,
Of Counsel for Petitioner.